PP

v.

SIKAL SAHIBUDDIN

HIGH COURT SABAH & SARAWAK, SANDAKAN
RICHARD MALANJUM J
[CRIMINAL TRIAL NO: S47-01-2001]
21 SEPTEMBER 2001

CRIMINAL PROCEDURE: *Trial - End of prosecution's case - Whether prima facie case established*

CRIMINAL LAW: *Dangerous Drugs Act 1952 (Malaysia) - Trafficking in dangerous drugs - Samples tested - Amount of - Whether 10% rule complied with - Dangerous Drugs Act 1952, ss 37(d), (da), (j)*

EVIDENCE: *Expert evidence - Whether person specially skilled - Whether formal training necessary - Evidence Act, s. 45*

The accused was originally charged for trafficking in dangerous drugs. The prosecution case's was that three groups of police personnel led by PW4, PW5 and PW3 carried out inspection on passengers on a ferry. It was during this inspection that the accused was found with plastic packets containing crystal-like substance under the inner cover of the sole of his left shoe. The packets were subsequently handed to the chemist, PW1. It was the conclusion of PW1 that after conducting all the tests, he found that the crystal-like substance contained 111.35g of methamphetamine, a type of drug classified and defined as a dangerous drug under the Dangerous Drugs Act 1952 ('DDA').

At the end of the prosecution's case, counsel for the accused submitted that the defence should not be called for the following reasons:

(a) that PW1 was not an expert within the meaning of s. 45 of the Evidence Act;

(b) that there were infirmities in the analysis of the drug;

(c) that there was insufficient amount tested;

(d) that there was doubt as to the identity of the drug tested;

(e) that there were inconsistencies in the evidence of PW3; and

(f) that there was insufficient evidence of possession.

Held:

[1] PW1 had his formal academic qualification and experience. His schedule of duties included the testing of various types of dangerous drugs. Although he had no formal training as such, he had on the job training under the supervision of his superiors. It was also unchallenged that he had conducted numerous tests involving methamphetamine and that he had given evidence several times in the lower courts and once in the High Court before the present case although he was not sure whether his testimonies were accepted by the courts. Hence there was no basis to question the qualification and ability of PW1 who was called as an expert witness in this case. (p 595 c-h)

[2] PW1 went to a great length explaining the steps and the purposes that he took when he did the tests. The mode adopted in the testing of the crystal-like substance was never challenged by the defence. Hence the contention that there were infirmities in the tests had no merit.
(p 596 a)

[3] Under s. 37(j) of the DDA, the chemist is required to take a minimum of 10% from the receptacle in which the drug was found. The facts disclosed that PW1 only took random samples of indeterminate weights and for the quantitative tests he took 21 samples with the total weight of only 0.2986g. The total weight of the crystal-like substance was 144.1969g. The prosecution therefore had not established conclusively the required factual basis, namely that the accused was in possession of 50g of methamphetamine, owing to the failure of the adequate quantity test. Hence the invocation of the statutory presumption of trafficking as defined under the DDA could not be made. The prosecution had failed to establish a *prima facie* case against the accused for trafficking in dangerous drugs. (pp 596 f-h & 598 c-d)

[Charge amended to that of possession. Accused convicted on his plea of guilty.]

Case(s) referred to:

PP v. Alex Muharram and Another (Criminal Trial Nos. K47-02-1999 & K47-03-1999) (unreported) ***(foll)***

Loo Kia Meng v. PP [2000] 3 CLJ 653 ***(foll)***

PP v. Mok Kar Poh [2001] 5 CLJ 206 ***(cit)***

Legislation referred to:

Dangerous Drugs Act 1952, ss. 39A, B

Evidence Act 1950, ss. 37(d), (da), (j), (xvi), 45

For the prosecution - Mahmud Hj Abdullah DPP
For the accused - Frederick Pang Kin Chiau; M/s Lau Ngan Siew & Co

Reported by Mariette Peters-Goh

JUDGMENT

Richard Malanjum J:

Introduction

On 27 August 2001 I convicted the accused on his own plea of guilty on an amended charge under s. 39A of the Dangerous Drugs Act 1952 (the Act) and I proceeded to sentence him to a term of imprisonment for 15 years from the date of his arrest and also imposed 12 strokes of whipping. In concluding my oral judgment I stated that I would give my reasons in the event of an appeal. As the prosecution has filed an appeal this is therefore the grounds of my decision.

The accused was originally charged for trafficking dangerous drug, namely, methamphetamine. The charge reads thus:

> Bahawa kamu adalah dituduh dan tuduhan terhadap kamu adalah seperti berikut:
>
> > Bahawa kamu pada 2hb Nov 2000 jam lebih kurang 01.00 tengahari bertempat di tempat pemeriksaan penumpang Ferry di Pelabuahan Karamunting, dalam daerah Sandakan, dalam Negeri Sabah Malaysia, dengan mengetahui iaitu ada dalam milik kamu sejumlah 158.0 gram Methamphetamine iaitu sejenis dadah berbahaya yang disenaraikan di dalam Bahagian III Jadual Pertama Kepada Akta Dadah Berbahaya 1952 (Pindaan 1998), tanpa sebarang kebenaran dan kuasa kuasa yang sah atau sebarang kaedah kaedah Akta Tersebut yang berkuat kuasa. Oleh yang demikian kamu telah melakukan kesalahan yang boleh dihukum di bawah Sek. 39B(2) Akta Dadah Berbahaya tahun 1952 (Pindaan 1998).

The accused pleaded not guilty and the trial proceeded. The prosecution called several witnesses including a chemist. At the end of the prosecution's case the defence submitted that there was no case to answer. After hearing the respective submissions both from the learned counsel for the accused and the learned deputy I ruled that there was no case to answer on the charge preferred but held that from the evidence adduced a *prima facie* case had been made out against the accused to answer a charge for possession of dangerous drug. Hence I amended the charge to read as follows:

> Bahawa kamu, SIKAL SAHIBUDDIN SAINUDDIN dituduh atas arahan Pendakwa Raya, Malaysia dan tuduhan terhadap kamu adalah seperti berikut:
>
> > Bahawa kamu pada 2 November 2000 jam lebih kurang 1.00 petang bertempat di kawasan Pemeriksaan Penumpang Pelabuhan Karamunting,

Sandakan, di Negeri Sabah, telah mengedar dadah merbahaya iaitu Methamphetamine seberat 111.35 gram dan dengan itu kamu telah melakukan kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

When I called the accused to enter upon his defence on the amended charge he opted not to and proceeded to plead guilty to it. It was also accepted by the defence that the version of the prosecution as elicited from the evidence adduced should be the basis for the facts of the case. Indeed the accused accepted as correct the version of the prosecution as to the event leading to his arrest including the fact that the drug was found in his person at that time. Accordingly I convicted and sentenced him.

The appeal by the prosecution is in fact against the ruling that I made at the end of the prosecution's case. Hence the grounds herein are wholly on the ruling that I made.

The Prosecution's Case

It is the case for the prosecution that on 2 November 2000 at about 12 noon a team of police personnel led by Sergeant Hillary Joseph Samtang (PW4) proceeded to the Ferry Terminal at Karamunting Port in Sandakan to carry out normal inspection work on the passengers of a ferry called MV Donica Joy II coming from Zamboanga, Philippines that day. The other members of the team were Corporal Sim Ah Tey (PW5), Corporal Stanley Anak Hilie and Lance Corporal Wanita Roslina binte Roslan. Two other police personnel were also there to assist the team, namely, Lance Corporal Mohd Akhir and Constable Norliza.

On arrival at the place they went on to get ready the site where the inspection would be carried out which involved the fencing up of the site and the setting up of alpha beds as tables for the inspection. Thereafter the ferry arrived at around 12.15pm and after the clearance by the Immigration, Health, Customs and Marine officers for the passengers to disembark the inspection began. In addition to the inspection team that day there was another group of Police personnel led by Inspector Amanjit Singh (PW3) together with Corporal Januri Darsan, Lance Corporal Nazri Borhan, and Lance Corporal Martinus Misak present in the vicinity monitoring the passengers as they were inspected.

PW4 gave an account on how the process of inspection was carried out including the fact that the male and female passengers had to go on different lanes. And PW4 said that while they were carrying out the inspection he heard Corporal Stanley raising his voice twice ordering one male passenger to take off his shoes. Soon after he heard Lance Corporal Mohd Akhir calling Inspector Amanjit Singh to come and see what they had found. And while

this was going on PW4 said that one male passenger in a blue tee-shirt and without being called broke from the queue and hastily walked towards him. He stopped the person and asked him where he was going. PW4 also said that he asked for his passport. According to PW4 that male passenger at that time was looking right and left and also towards the person that was detained earlier. On inspection of the passport PW4 said that that male passenger admitted his name as stated in the travel document. PW4 identified in court that person as the accused. Body search was also conducted on the accused by PW4. Nothing was found. However Corporal Sim Ah Tey (PW5) asked the accused to take off his shoes. He did so albeit slowly and according to PW4 the accused was shivering, his face pale and that he kept his head down. On examination under the inner cover of the sole of the left shoe of the accused and in his presence PW4 said that Corporal Sim Ah Tey found four plastic packets containing a crystal-like substance. Under the inner cover of the sole of the right shoe four plastic packets were also found containing crystal-like substance. And after seeing them PW4 said that he ordered Corporal Sim to put back those packets to the places where he found them. Soon after PW3 passed by on his way to see Lance Corporal Mohd Akhir and on seeing what were found he asked PW4 to order the accused to wear back his shoes. Having worn the shoes PW4 then asked PW5 – Corporal Sim to handcuff the accused and taken to the side of the fence with Corporal Januri guarding him. It was also the testimony of PW4 that he remembered the shoes to be dark in colour and with the brand name of 'Strong'.

PW5 – Corporal Sim Ah Tey also gave a similar account of the event. In his evidence PW5 said that after the examination of the accused by PW4 he was not prepared to clear him due to his suspicious behaviour and appearance at that time. According to this witness the accused was shivering and looked pale. That made him ask the accused to take off his shoes. According to this witness the inner covers of the sole of the shoes were not sewn. And he further said that besides finding the plastic packets he also found small pieces of paper in the other compartments of the sole of both shoes. He also examined the bag and other belongings of the accused. Before making the accused wear back his shoes PW5 said that he put back the plastic packets containing the crystal-like substance to where he first found them. PW5 also identified in court the accused as the person whose shoes he found the plastic packets containing the crystal-like substance.

Indeed there was not much dispute on the accounts of PW4 and PW5 pertaining to the events leading to the search and subsequently the arrest of the accused. There was also hardly any challenge to the discovery of the eight plastic packets containing the crystal-like substance found hidden in the compartments of inner soles of the pair of shoes the accused was wearing that day.

It was the evidence of PW3 Inspector Amanjit Singh that while he was making his observation from the outer side of the inspection site he was called by Lance Corporal Mohd Akhir to have a look at what he had found from one of the passengers. On his way towards that officer he passed by PW4 and PW5 who were then examining the inner sole of one of the shoes of a person who was wearing a blue tee-shirt. And PW3 said that he saw PW5 taking out one plastic packet containing crystal-like substance. He then instructed PW5 that on completion of the examination of the shoes all items found should be put back to the original places where they were first found and for the person to wear back his shoes. It was also his instruction that the person was to be detained and handed over to Lance Corporal Januri. This witness also confirmed in court that the person who was detained by PW5 was the accused.

After he had dealt with the other matter for which he was called in, PW3 said that he instructed Lance Corporal Martinus to go back to the police station to get a camera. And while waiting for the camera to come PW3 said that he drew a rough sketch plan of the place of incident. On return of Lance Corporal Martinus PW3 said that he instructed him to photograph both the persons detained that day. In respect of the accused photographs of him were taken in relation to the shoes from which the plastic packets containing the crystal-like substance were found. And after the photo session PW3 said that he took the accused for immigration clearance before taking him to the Narcotic section of the Sandakan Police Station. On arrival he proceeded to make a police report on the incident. After making the report PW3 said that he proceeded to mark the items that were found in the shoes of the accused. He marked the plastic packets found in the inner sole of the left shoe with numbers from one to four and the pieces of paper with letters from A to F respectively. He also put down his initials next to the markings. As for the right shoe he did the same by marking the plastic packets with numbers from five to eight and the pieces of paper found therein with the letters from A to E. Having made the markings he laid those items on his table and instructed Lance Corporal Martinus to take some more photos of the same. After that he then handed all the items taken from the accused to the investigation officer Inspector Halimah. While in the witness box PW3 identified all the items that were taken from the accused. Some were marked as court exhibits through him.

PW7 Inspector Halimah testified that at about 3.30pm on 2 November 2000 she went to see PW3 in connection with a Sandakan Police Report 9416/2000. She read the report. It was in relation to an arrest of a person found to be in possession of dangerous drug. PW7 identified in court the accused to be the person arrested that day. Besides receiving the report PW7 said that she also took possession of the items seized from the accused including the shoes. And she examined the contents of the inner soles of both the left and right shoes

wherein she found eight plastic packets containing the crystal-like substance and pieces of paper. These according to PW7 had marks as described by PW3. PW7 went on to say that she took all the items to her office and packed them. But before doing so she labeled each of the eight plastic packets containing the crystal-like substance. She clipped on to each of them a yellow piece of paper and written on each of the piece of paper the markings exh. 2.1 to 2.8 respectively.

After that PW7 put all the eight packets inside a plastic bag and then into a brown envelope. On the envelope she wrote the police report number namely, "SKN/RPT/9416/2000" and another marking 'X' on the right hand side. The envelope was subsequently glued and sealed with 'Pol 544'. The envelope package was then put inside a steel cabinet in her room and locked. According to PW7 no one else could use the steel cabinet and the key to it was kept at all times by her.

On 8 November 2000 at around 7am she took out the package. She found it to be in order and no evidence of tempering. She was taking it to the chemistry department Kota Kinabalu. She filled in the form Kimia 31. On arrival at Kota Kinabalu she then proceeded to the chemistry department and at about 9.19am she met PW1 Shaari bin Desa, a chemist. PW7 said that she handed the package to PW1 and received an acknowledgement receipt for it.

On 17 January 2001 she returned to the chemistry department to collect the chemist report as well as the package from PW1. According to PW7 the envelope was sealed with the seal of the chemistry department. There was also an additional writing on the envelope package, namely the words '(KK) FOR 1813/00-0'. Thereafter she returned to Sandakan and kept the package in the same steel cabinet found in her room. The next time she saw the package was to bring it to court for the purpose of the trial.

PW7 was asked on the condition of the steel cabinet in her room. Her reply was that it was secured not only by the built-in lock and key but also by a fixed metal bar with padlock. And PW7 said that no one else had access to the cabinet as it was her personal property.

PW1 – Encik Shaari Desa began his testimony by giving his qualification and training as a chemist. He obtained his Bachelor of Science (Honours) degree from Universiti Kebangsaan Malaysia majoring in chemistry in 1991. Later on he joined the chemistry department in Petaling Jaya in 1992. He was transferred to the chemistry department Sabah in 1997. According to this witness he had in-house training on the job he was doing. In September 2000 he sat for the proficiency test conducted by NARL of Australia. In that test unknown samples were sent to the branches of the chemistry department in Malaysia and the candidates were supposed to make their own analysis of the

samples given and returned the results of the analysis back to Australia for verification. According to this witness he was successful in the test. Specifically this witness also said that he had on many occasions analysed substance to test for methamphetamine drug since he came over to Kota Kinabalu. And this witness also said that he had given evidence several times in the magistrate courts and sessions courts and once in the High Court. But he could not confirm if his testimonies were accepted as he was not informed.

PW1 gave evidence of what he did with the package he received from PW7 on 8 November 2000 which had markings of 'X', sealed with 'Polis Diraja Malaysia 544' and labeled with SKN/RPT/9416/2000 and SKN/IP No. 68/2000. According to him upon receipt he examined the package and its contents. He found that inside the envelope there was a plastic package with a yellow Police Tag 38. And inside the plastic package there were eight separate plastic packets bearing markings from exh. 2.1 to 2.8 respectively and each containing a crystal-like substance. On completion of his examination he issued a computer generated acknowledgment receipt bearing reference (KK) FOR 1813/00-0 to PW7. Thereafter he kept it in the steel cabinet inside the strong room of the department. He said that he was the only person who had the key to that steel cabinet. That day this witness said that he also received the Polis 31 – a request for analysis from PW7.

On 4 December 2000 he took out the said package to begin his examination and analysis of the substance in the eight plastic packets. He did not find any evidence of tampering of the package. He began by recording the descriptions of the package as well as the eight plastic packets found inside. He also made photo-copies of the markings on them while the crystal-like substance were still inside. He took that step in order to facilitate recognition of the same. After that he proceeded to find out the weight of the crystal-like substance found inside the eight plastic packets using a scale called 'Sartorius BP 221S' which was in working condition at that time. He began by first weighing each of the plastic packets together with the contents. Then he proceeded to take out the contents and then weighed the empty plastic packets individually. From the results he found out the weight of the contents of the eight plastic packets. The results were recorded as thus:

Packets markings	Total Weight	Weight of the empty plastic packets	Weight of the crystal-like substance contents
Ex.2.1	26.7390 g	1.9274 g	24.8116 g
Ex.2.2	24.9515 g	1.7164 g	23.2351 g
Ex.2.3	25.0458 g	1.9238 g	23.1220 g
Ex.2.4	22.2225 g	1.6956 g	20.5269 g

Ex.2.5	26.6904 g	1.6830 g	25.0074 g
Ex.2.6	19.5591 g	1.8698 g	17.6901 g
Ex.2.7	6.0026 g	1.8502 g	4.1524 g
Ex.2.8	7.6146 g	1.9632 g	5.6523 g

After finding the weights of the contents of the eight packets this witness said that he homogenised the crystal-like substance taken from the eight plastic packets by grinding them to powder form using a machine called the 'Sumeet'. That process took about five minutes. It was his evidence that the grinding machine was in working condition and there was no other foreign matter inside it before he commenced the grinding.

The next step this witness took was to take samples from the homogenised powder for the purpose of conducting three sets of test with the aid of different equipment. It was the evidence of PW1 that he took samples at random from the homogenised powder for the respective first two sets of test and 21 samples for the third set of test.

The first set of test was the colour test involving three types, namely, the Marquis's Test, the Simon's Test and the Silver Nitrates Test.

In respect of the Marquis's test the purpose was to find out the presence of the substance called 'Amines' in the homogenised powder. In this case this witness said that his finding was in the affirmative on the presence of such substance. As for the Simon's test the purpose was to determine the presence of 'secondary amines' group thereby confirming the existence of methamphetamine in the powder. In this case the finding was positive. And the third test was to find out the presence of salt and the result of the test was also in the affirmative.

The second set of test involved the use of an equipment called the Gaschromatography-Messpectrometer (GC-MS). The purpose was to find out the presence of methamphetamine hydrochloride, a type of methamphetamine salt in the homogenised powder. His finding was positive.

For the third set of test, the quantitative test, an instrument called the Gaschromatography (GC) was used. The purpose was to determine the purity of methamphetamine found in the homogenised powder. And the finding was that the homogenised powder contained 77.75% methamphetamine with an error analysis margin of 0.52%.

It was the evidence of this witness that in respect of the first two tests he took random samples of indeterminate weights from the homogenised powder whereas for the third test he took 21 samples with the total clean weight of 298.6 milligrammes.

And it was the conclusion of this witness that after conducting all the tests he found that the crystal-like substance contained 111.35 grammes of methamphetamine, a type of drug classified and defined as a dangerous drug under the Act.

A chemist report was prepared by PW1 and it was admitted and marked as exh. P4. As for the balance of the homogenised powder PW1 said that he put it inside a plastic bag that he supplied together with the eight plastic packets from which the crystal-like substance were found before being homogenised. Then he put the same inside the original plastic bag and into the brown envelope with the markings, *inter alia* 'X'. Thereafter he stored it inside the steel cabinet in the strong room of the department. On 17 January 2001 at about 11.25am PW1 said that PW7 came to collect the package and the chemist report from him.

PW1 was also asked on the condition of one of the equipment that was used for the tests. It arose due to the notes of proceeding in the magistrate's court where it was recorded that the prosecuting officer sought for a longer period to mention the case due to an alleged breakdown of the equipment in the chemistry department in Kota Kinabalu. It was the evidence of PW1 that the equipment were in working conditions when he did the tests on the crystal-like substance found in the eight plastic packets. And he said that he was only informed by the laboratory assistant that the GC machine broke down on 25 December 2000 and that was long after he had conducted the tests in this case.

Submissions Of No Case To Answer

At the end of the prosecution's case learned counsel for the accused submitted that the defence should not be called for the following reasons:

(i) that PW1 was not an expert within the meaning of s. 45 of the Evidence Act 1950;

(ii) that there were infirmities in the analysis of the drug;

(iii) that there was insufficient amount tested;

(iv) that there was doubt as to the identity of the drug tested;

(v) that there were inconsistencies in the evidence of PW3; and

(vi) that there was insufficient evidence of possession.

In reply, *inter alia*, it was the submission of the learned deputy that the prosecution relied on s. 37(d) and s. 37(da)(xvi) of the Act. It was also his contention that the evidence of PW1 concluded that the weight of the drug

found was 111.35 grammes. As regards s. 37(d) of the Act it was submitted that the accused was presumed to be in possession of the drug and had knowledge of the same. Much reliance was also placed on the testimony of PW4 on that point.

In respect of the amount of drug taken to be tested it was the contention of learned deputy that s. 37(j) should not be applied in this case since that section should be confined to where the drugs were contained in a number of receptacles. Learned deputy further contended that the requirement of 10% of the total weight of the drug to be tested should not be applied.

Finding

On the standing of PW1 evidence was led as to his qualification. There was no evidence to contradict it. As such I accepted that PW1 had his formal academic qualification, namely, that he obtained his Bachelor of Science (Honours) majoring in chemistry from Universiti Kebangsaan Malaysia in 1991. He is also a member of the Institut Kimia Malaysia. He commenced work as a government chemist in 1992 and was stationed at the chemistry department in Petaling Jaya. In 1997 he was posted to the chemistry department in Kota Kinabalu. His scheduled of duties included the testing of various types of dangerous drugs. And although he had no formal training as such PW1 said that he had on the job training under the supervision of his superiors. It was also unchallenged that he had conducted numerous tests involving methamphetamine. And that he had given evidence several times in the lower courts and once in the High Court before the present case although he was not sure whether his testimonies were accepted by the courts.

PW1 also said that he participated in a test conducted by NARL of Australia in September 2000. According to him the results of his analysis of the samples given were correct.

There was hardly any cross-examination of PW1 as to his qualification. And in fact there were also very few questions as to the manner in which he conducted the tests on the crystal-like substance in this case. And having considered his academic qualification as well as the exposure he had while as a government chemist I found no reason not to accept PW1 as an expert and duly qualified to give evidence as such. Hence, there was no basis to question the qualification and ability of PW1 who was called as an expert witness in this case. Accordingly I accepted his conclusion that he found methamphetamine presence in the crystal-like substance that was seized from the accused.

On the assertion that there were infirmities in the tests conducted by PW1 on the crystal-like substance found in this case I was also of the view that there was no basis to make such a conclusion. In the first place the mode adopted

in the testing of the crystal-like substance was never challenged by the defence. Secondly PW1 went on to a great length explaining the steps and the purposes that he took when he did the tests. Those were not contradicted by the defence. Hence the contention that there were infirmities in the tests had no merit.

Next, the amount of the samples tested was attacked in that they were not in conformity with the previous decisions of the courts. The case of *Loo Kia Meng v. PP* [2000] 3 CLJ 653 CA was relied upon. It was submitted that s. 37(j) of the Act provides for the 10% rule. And in this case there was no dispute that for the colour test and the test involving the use of Gaschromatography-Messpectrometer (GC-MS) PW1 only took random samples of indeterminate weights and for the quantitative test he took 21 samples with the total weight of only 0.2986 gram. The total weight of the crystal-like substance was 144.1969 grammes. Hence it was contended that there was no evidence to show that the total weight of the samples taken came up to 10% of the total weight of the crystal-like substance. As indicated hereinabove the learned deputy differed on the applicability of the said s. 37(j) of the Act.

In *Loo Kia Meng*'s case *(supra)* the appellant was convicted of trafficking 4,105 grammes of cannabis. Two main points were raised on appeal, namely the error in relying on presumption over presumption in relation to subsections 37(d) and 37(da) and the failure to comply with s. 37(j) of the Act. In respect of the first contention the Court of Appeal held that there should be an affirmative finding made in relation to sub-s. 37(da) and not to base the same on a presumption under sub-s. 37(d). And as for sub-s. 37(j) it was said thus:

> Now under s. 37(j) of the Act, the chemist is required to take a minimum of 10% from the receptacle in which the drug was found. The chemist merely said he took 20 random samples but nowhere has he said in his evidence that this 20 random samples represented at least 10% of the dried plant material. For all we know the 20 random samples may be more, or for that matter, may be less than 10%. It is incumbent upon the chemist to take a minimum of 10% by virtue of s. 37(j) of the Act. We find that when he said he took 20 random samples, it is ambiguous as the 20 samples could be more or less than 10%. The learned DPP submitted that the 20 samples taken by the chemist represented a fair sample of the total. With respect, we are unable to agree with that submission because the 20 samples could well be much less than the 10% required to be taken. **We hold that pursuant to s. 37(j) of the Act, the chemist is required to give the actual amount or the actual weight of the samples taken in order to comply with that section**.
>
> In this respect, we refer to the case of *Leong Bon Huat v. PP* [1993] 3 MLJ 11 where it was in the evidence of the chemist that the total weight of samples taken for analysis was "more than 10%" of the net weight of the material" (emphasis added).

per Shaik Daud JCA at pp. 657-658.

Subsections 37(d) and (da) read thus:

> 37. Presumptions
>
> In all proceedings under this Act or any regulation made thereunder:
>
> (a) ...
>
> (d) any person who is found to have had in custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug;
>
> (da) any person who is found in possession of:
>
> (i) ...
>
> (xvi) 50 grammes or more in weight of Methamphetamine;
>
> otherwise than in accordance with the authority of this Act or any other written law, shall be presumed, until the contrary is proved, to be trafficking in the said drug.

Subsection 37(j) reads:

> (j) when any substance suspected of being a dangerous drug has been seized and such substance is contained in a number of receptacles, it shall be sufficient to analyse samples of the contents of a number not less than ten per centum of such receptacles and if such analysis establishes that such samples are all of the same nature and description, it shall be presumed, until the contrary is proved, that the contents of all the receptacles were of the same nature and description as the samples so analysed and if such analysis establishes that such samples consist of or contain a dangerous drug, it shall be presumed, until the contrary is proved, that the contents of all the receptacles consist of or contain the same proportion of such drug.

From the evidence of PW1 it was not in issue that he did not ensure the weight of the samples that he took for the purpose of the first two tests that he conducted. And that is contrary to what the Court of Appeal had stated in *Loo*'s case *(supra)* where it was said that a chemist doing the test should 'give the actual amount or the actual weight of the samples taken in order to comply with that section'.

There may be room for argument that sub-s. 37(j) has no application where the drugs are not contained in receptacles. Unfortunately I did not find such distinction was made in *Loo*'s case *(supra)*. I would have thought that any

qualification to the principle enunciated would have been obvious. Neither is there any pointer to show that such principle is only applicable in a case involving cannabis as seems to be the view of the learned judge in the case of *PP v. Mok Kar Poh* [2001] 5 CLJ 206. Of course there may be merit in the approach taken in that case. However *Loo*'s case is binding on this court.

Accordingly, I was of the view that there was merit to the submission of learned counsel in so far as to the total weight of the samples taken by PW1 for testings in connection with the crystal-like substance found in this case. Hence it was my findings that the prosecution had not established conclusively the required factual basis, namely that the accused was in possession of 50g of methamphetamine, owing to the failure to observe the 'adequate quantity test'. Hence the invocation of the statutory presumption of trafficking as defined under the said Act could not be made. It followed that the prosecution had failed to establish a *prima facie* case against the accused under s. 39B of the said Act.

I was also fortified in my view by an earlier judgment (which I have no reason to disagree) delivered by his Lordship Datuk Charles Ho J in the case of *PP v. Alex Muharram and Another* (Criminal Trial No. K47-02 and 03 of 1999) (unreported) where he said this:

> The 'adequate quantity' test laid down in *Leong Bon Huat*'s case was followed in several High Court decisions (see *PP v. Mohammad Bin Ambunani* [1994] 4 CLJ 471; *PP v. Alex Bin Hamzani* [1995] 3 CLJ 102; *PP v. Saad Bin Mat Takraw* [1998] 3 CLJ 380).
>
> It would appear that in the above-mentioned cases, their Lordships were of the unanimous opinion, (a) in order to raise the presumption of trafficking under s. 37(da) of the Act it must be conclusively established that the appellants were in possession of the statutory minimum of 200g of cannabis; (b) to determine the statutory minimum the chemist must actually carry out tests on 200g or more of the cannabis and not by means of representative samples of less than 200g. It would follow, therefore, from those decisions of the Supreme Court and High Courts that for example, in the case of the drugs methamphetamine 50g or more must be tested in order to satisfy the adequate quantity test and to raise the statutory presumption. It is, however, contended by the learned deputy public prosecutor that *Leong Bon Huat*'s case and the decisions of the cases in the High courts cited by the defence only applied to cannabis because the method used in analysing cannabis was different from the method used for analysing methamphetamine. The main difference, according to the learned deputy public prosecutor is that cannabis cannot be homogenised but in the case of methamphetamine it can be done. Therefore he says that it is possible in methamphetamine to take representative samples at random for testing in order to determine what the total weight of the drugs in the whole of the substance tested. Upon careful reading of those decisions I do not think, with

respect, that any distinctions could be drawn between cannabis and other dangerous drugs as far as the methods of analysing or testing are concerned.

There is no doubt that the issue raised by the defence is of a technical nature. We must, however, bear in mind that in a criminal case (especially in a case involving the death penalty) the defence is entitled to take advantage of any loopholes in the law. The provisions of the statute must be strictly interpreted. Since *Leong Bon Huat*'s case was decided some years ago I do not understand why in the present case the chemist did not use 50g or more for testing. It might be that the chemist was not aware of this decision and the other decisions of the High Court. However, to be fair to the chemist the method adopted by him has not been challenged and no one could really say that there was an error in his conclusion that there were 130.08g in the crystal-like substances he analysed. He might have thought that if the total weight of methamphetamine could be determined by analysing representative samples of 141.7mg in weight it would be a waste of time and energy to use samples totaling 50g or more. Logically he would be correct in so thinking. For my part *PP v. Bon Huat* is a decision of the highest court in the land and it goes without saying it is binding on this court.

For reasons given above I am of the view that since the prosecution has failed to establish conclusively that the 1st accused was in possession of 50g or more of the drugs methamphetamine to be determined by using the 'adequate quantity test', the presumption of trafficking could not be invoked in the present case.

As for the other points raised by learned counsel for the accused I did not find any merit in them. In so far as to the identity of the crystal-like substance that was taken from the accused, analysed and with the balance tendered in court I found that there was no doubt that it was the same substance. There was no break in the chain of the evidence as to warrant any finding otherwise. Similarly on the assertion that there was inconsistency in the evidence of PW3 I did not find such inconsistency sufficiently material so as to have made the testimony of PW3 questionable. If at all there was any inconsistency it only indicated a lapse of memory on the finer details of the event thereby showing the veracity of his evidence as a whole and that it was not of recent creation.

In respect of evidence on possession of dangerous drug by the accused I found there was more than adequate evidence adduced by the prosecution. In fact none of the evidence of the witnesses called in relation to the search and arrest of the accused was seriously challenged by the defence. There was also no possible explanation suggested to any of the witnesses who testified on the appearance and behaviour of the accused when he was apprehended with the crystal-like substance in the compartments of the soles of his shoes. There was also hardly any dispute as to the finding by PW1 of the presence of methamphetamine in the crystal-like substance seized from the accused on 2 November 2000.

As indicated above that there was a glitch in respect of the amount of samples taken for analysis. For that reason I did not think it fit to call for the defence on the charge of trafficking of dangerous drugs preferred against the accused. But having said the foregoing that should not be taken as casting doubts on the qualification and ability of PW1 as an expert witness in this case. Accordingly I proceeded to amend the charge to one of possession as I was satisfied that the prosecution had established a *prima facie* case on that score.

And on being called to enter upon his defence on the amended charge the accused opted to plead guilty thereon and accepted that the evidence so far adduced by the prosecution were true in so far as to the fact of possession of the drug in question. As such the earlier contentions raised, save as to the amount of the drug analysed, were no longer in issue.

The above were my reasons for the ruling that I made in this case.